

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. MYERS DISTRICT OFFICE

Reyes Mendoza,
Employee/Claimant,

OJCC Case No. 12-022645KAS

vs.

Accident date: 9/14/2012

All Trades Construction, LLC/Frank
Winston Crum Insurance, Inc.,
Employer/Carrier/Servicing Agent.

Judge: Kathy A. Sturgis

FINAL COMPENSATION ORDER

After proper notice to the parties the above captioned workers' compensation case came for final hearing before the undersigned on April 29, 2014, in Fort Myers, Lee County, Florida, on the petition for benefits docketed on October 24, 2013. Reyes Mendoza ("Claimant") was represented by Victor Arias, Esq. and the Employer/Carrier ("E/C") was represented by Jonathan Cooley, Esq. The evidence closed on April 29, 2014 after Claimant's attorney filed Dr. Idewu's deposition transcript.

CLAIMS

The following claims were the subject of this hearing:

1. Authorization of follow up visits with the ENT physician;
2. Authorization of nasal septum reconstruction surgery per Dr. Idewu;
3. Attorney's fees;
4. Penalties, interest and costs pursuant to Section 57.105 (3) (B).

DEFENSES

The defenses to the above claims were:

1. Entire claim denied, accident did not arise from employment;
2. Claimant was aggressor;
3. Claimant committed acts in violation of Section 440.105 and is barred from receiving benefits by Section 440.09;
4. Penalties, interest, costs and attorney fees are not due and owing.

EXHIBITS

The exhibits listed on Exhibit A attached hereto were received into evidence without objection except as noted.

STIPULATIONS OF THE PARTIES

I adopt as findings of fact the stipulations of the parties as set forth in the pre-trial stipulation (Exhibit 3).

LIVE WITNESS TESTIMONY

The Claimant, Reyes Mendoza testified live at the merits hearing. Also testifying live at the merits hearing were Claimant's co-workers, Rodrigo Padilla and Alejandro Maldonado.

SUMMARY OF MATTERS IN DISPUTE

The primary issue in dispute is whether Claimant's nose injury is compensable since it occurred during the course of an altercation between Claimant and another co-worker.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the foregoing stipulations, all the evidence presented, I hereby make the following findings of fact and conclusions of law:

1. I have jurisdiction over the subject matter and parties.
2. Venue is properly in Lee County, Florida
3. It is undisputed that Reyes Mendoza, the Claimant, sustained an injury to his nose on September 14, 2012 during a fight with a co-worker. The issue is whether that injury is compensable under the Florida Workers' Compensation Act (Chapter 440 Florida Statutes).
4. Claimant was working for Employer as a carpenter on September 14, 2012. Claimant was picked up at his home by Nino, his supervisor, for the drive to the jobsite. Nino also picked up several other co-workers. On September 14, 2012 Claimant was sitting on the driver's side in the third row of seats in the vehicle. Claimant had his eyes closed and his head back. At some point during the drive Rodrigo Padilla, a co-worker seated on the passenger side in the second row of seats, picked up a leaf or blade of grass and tickled Claimant's nose with it. Claimant did not like this and said he didn't get along with Rodrigo Padilla. Nothing further happened in the vehicle. [Rodrigo Padilla's trial testimony]

5. The vehicle arrived at the jobsite and everyone exited the vehicle. Nino went into the house they were working on. Rodrigo Padilla approached the Claimant and apologized for what he had done in the vehicle. Claimant did not accept the apology and began insulting Rodrigo Padilla. Rodrigo Padilla finally asked Claimant if he wanted to settle the problem another way, and Claimant said okay. Rodrigo Padilla then walked up behind and to the side of Claimant and said, "hit me". Claimant swung at Rodrigo Padilla but did not connect. Rodrigo Padilla responded by punching back, and hit Claimant in the face and walked away. Claimant came after Rodrigo Padilla and punched him. Rodrigo Padilla called for help, and finally pulled away from Claimant who had hold of his shirt. Rodrigo Padilla's shirt ripped as he got away from Claimant, who kept coming after him. Nino came out of the house and stopped Claimant by the vehicle; and then took him to the hospital. [Ex. 11 P 8-15 and Rodrigo Padilla's trial testimony]

6. Claimant was seen at the hospital and later came under the care of an otolaryngologist, Dr. Idewu. Claimant filed a petition for benefits seeking authorization of nasal septum reconstruction surgery, per Dr. Idewu. Claimant also complains of headaches, breathing problems and hearing loss all of which he connects to the punch in the face. Claimant denies having had prior treatment for headaches. He also denied having had headaches after his previous workers' compensation injury in 2009 (Ex. 10 P26 L13-14).

7. In 2009 Claimant fell off a ladder. Claimant testified the ladder slipped and flipped backwards and he fell on the step, hitting his right leg and his head losing consciousness (Claimant's trial testimony as to hitting his head, he denied same in his deposition). He testified at trial he told Dr. Gomez, the orthopedic surgeon treating his ankle and back, that he had headaches, but received no treatment for same. He also treated with Dr. Hood, pain management physician for that injury and received injections. Claimant testified only that he had received lumbar injections.

8. Claimant's trial testimony conflicts with his deposition testimony. In his November 2012, deposition he denied having struck his head on the ground or losing consciousness in the 2009 work injury. He also denied having headaches after his 2009 work accident.

9. Medical records from Drs. Gomez and Hood document numerous complaints of headaches during Claimant's medical treatment for his 2009 work injury. Dr. Gomez did not treat the headaches but he notes Dr. Hood administered cervical injections and afterwards Claimant complained of increased headaches. These medical records contradict Claimant's

testimony he only received lumbar injections and had no headaches after the 2009 work accident and injuries. [Ex. 12 – records from: 5/20/10, /6/7/10, 7/21/10, 7/26/10, 8/26/109/27/10].

10. Claimant continued to treat with Drs. Hood and Gomez after the 2009 work injury through 2010 and into 2011. The last medical records in evidence were May, 2011, only a year and half before his November, 2012 deposition for Claimant's September 14, 2012 workers' compensation claim.

CLAIM FOR COMPENSABILITY OF THE SEPTEMBER 14, 2012 INJURIES

WILLFUL INTENT OF EMPLOYEE TO INJURE HIMSELF OR ANOTHER

Claimant seeks compensability of the September 14, 2012 injuries. Section 440.09 (3) (Florida Statutes 2011) provides in pertinent part, "Compensation is not payable if the injury was occasioned primarily . . . by the willful intention of the employee to injure or kill himself, herself, or another." The evidence regarding the altercation came from: 1) Claimant's live and deposition testimony; the live testimony of Rodrigo Padilla; and the deposition testimony of Juan Fuentes Cruz. Although Alejandro Maldonado also testified at the merits hearing his testimony was worthless, as he claimed not to have seen anything. No other testimonial evidence regarding the dispute was placed on or in the record.

11. The testimony of Juan Fuentes Cruz is consistent with the version of the altercation given by Rodrigo Padilla and is contrary to that of the Claimant. Rodrigo Padilla tickled Claimant's nose with a leaf or piece of grass while they were both passengers in the vehicle. Claimant was upset about that, and voiced his displeasure. There was no intent to injure Claimant in that "touching" in the vehicle by Rodrigo Padilla. No other physical contact was made while they were in the vehicle. Claimant was not physically injured by the touching which occurred in the vehicle.

12. When Rodrigo Padilla publically apologized to Claimant for the incident in the vehicle he was acting as a peacemaker, not an aggressor. Claimant was under no obligation to accept the apology, but his refusal to do so, coupled with his insulting Rodrigo Padilla was inflammatory and aggressive. Claimant then threw the first punch, even though it did not connect, making Claimant the aggressor. There was no intent to injure in Rodrigo Padilla's contact with Claimant in the vehicle. In contrast, Claimant's actions in throwing the first punch were intended to injure – Rodrigo Padilla, and possibly himself. Had Claimant connected his punch and injured his hand doing so, that injury would not be compensable. Claimant was the

first to show intent to injure or harm making him the aggressor. In assessing the demeanor and candor of the witnesses testifying live I found Rodrigo Padilla's testimony more candid and consistent with the evidence as a whole, than the Claimant's. Although Rodrigo Padilla's actions in the car were joking and somewhat juvenile, I found his apology to have been sincere and his actions intended to smooth over Claimant's negative response to the tickling incident.

AGGRESSOR DETERMINATION

Pursuant to the relevant case law an injury incurred in an altercation at the workplace may be compensable if Claimant can establish that his injury resulted from a co-worker's unprovoked aggression; that Claimant's work brought him into close proximity with the aggressive co-worker; and the object causing the injury was an implement of the employment. Claimant asserts he was not the aggressor in the altercation therefore his injuries should be compensable

13. After the vehicle arrived at the job site Rodrigo Padilla approached the Claimant and apologized to Claimant for what transpired in the vehicle, and said he would not do it again (Ex. 11 P8 L 20 – P9 L4). At that point neither of them was the aggressor. Claimant refused to accept the apology and proceeded to insult Rodrigo Padilla. Rodrigo Padilla asked Claimant what the problem was, he had already apologized, and asked if he wanted to resolve it another way, and Claimant said, "Okay" (Ex. 11 P 9 L5-18). Rodrigo Padilla then approached Claimant and said, "Go for it" and told Claimant to hit him. Claimant then turned around and threw the first punch at Rodrigo (Ex. 11 P 12 L16-18), but it did not connect, Rodrigo Padilla then instinctively punched back and hit Claimant in the face. After that Rodrigo Padilla left and the Claimant followed him and kept after him (Ex. 11 P 12 L6-9). Rodrigo Padilla yelled asking for help, for someone to get hold of Claimant (Ex. 11 P 12 L 122-23; and P 13 L20 -14 L 14 and Rodrigo Padilla's trial testimony).

14. The statute speaks of "unprovoked" aggression as being non-compensable. Both Claimant and Rodrigo Padilla's actions had elements which could be viewed as provocation. Rodrigo Padilla's actions and words in inviting Claimant to hit him might be viewed as provocative, however Claimant publically insulting Rodrigo Padilla after publically refusing to accept his apology was both inflammatory and aggressive; and then he threw the first punch. To the extent of conflicts in their respective testimony I accept Rodrigo Padilla's testimony over the Claimant's, which I found self serving at best. Claimant completely omitted the part of the incident where he chased after Rodrigo Padilla. Claimant's injury did not occur as the result of a co-worker's unprovoked aggression.

15. Claimant's counsel also argues that Rodrigo Padilla was much bigger and stronger than Claimant, but having had the opportunity to observe both Claimant and Rodrigo Padilla, I find this not to be the case. I found them to be about the same size, with no readily discernible size or weight advantage to either of them. One of Rodrigo Padilla's nicknames was "Shorty". They were both working in a physically strenuous trade. In 2012 Claimant was 5 feet 6 inches tall and weighed 160 pounds, ambidextrous, and ran for recreation prior to the 2012 incident (Ex. 10 P4 L9-14; P 27 L6-8).

16. Claimant also cites to Florida Forest and Park Services, v. Strickland, 18 So. 2d 251 (Fla.1944) for the proposition that if the identity of the aggressor is difficult to determine there is a presumption (of compensability) in favor of the Claimant. However, the Section 440.26 presumption referenced in that case is no longer in existence. Although earlier incarnations of Chapter 440 did contain a presumption in favor of the injured worker, this is no longer the case. Section 440.015 of the current statute (and the one in effect in 2012) sets forth the legislature's intent that the facts in a workers' compensation case are not to be interpreted, and the law is not to be construed, liberally in favor of either the rights of the injured worker or the rights of the employer. Accordingly there is no legal basis for Claimant's argument that where the evidence of whom the aggressor is unclear the Claimant should prevail.

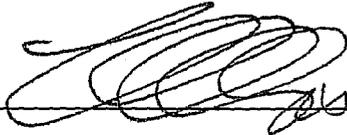
SECTION 440.09 AND 440.105 (4) 9b) DEFENSE

E/C also defends on the basis that Claimant knowingly or intentionally made false statements or misrepresentations during his November, 2012 deposition for purposes of obtaining workers' compensation benefits in this case. Those alleged misrepresentations involved his headache complaints after his 2009 work injury; prior to the September, 2012 injuries for which he also complains of headaches. It is clear Claimant did not receive treatment for his headache complaints from his physicians for the 2009 injuries. However, the records of those physicians are replete with his complaints of constant headaches, increased headaches, for months. In his November, 2012 deposition Claimant denied having had any headaches following his 2009 work injury, and also denied having hit his head in the 2009 injury (Ex. 10 P 26 L13 -16, P 28 L9-11). At the current merits hearing Claimant admitted hitting his head and losing consciousness in his 2009 work accident, directly contradicting his 2012 deposition testimony. There was no explanation for the change in his testimony, although the fact that E/C filed the medical records from his 2009 work accident may have had something to do with it. I find Claimant knowingly or intentionally misrepresented his medical history for the purpose of obtaining workers' compensation benefits and pursuant to 440.09 (4) (b) is precluded from obtaining workers' compensation benefits for his September, 2012 injuries.

IT IS HEREBY ORDERED AND ADJUDGED THAT

1. Claimant did not meet his burden to show entitlement to workers' compensation benefits resulting from an altercation on the job site in 2012.
2. The Claimant is precluded from receiving workers' compensation benefits pursuant to Section 440.09 (4) (b).
3. Claimant is not entitled to attorney's fees and costs from the E/C.

May **DONE AND ORDERED** in Fort Myers, Lee County, Florida on the 29 day of May, 2014.



Kathy A. Sturgis
Judge of Compensation Claims
4379 Colonial Boulevard Suite 200
Fort Myers, Florida 33966
(239) 938-1159

CERTIFICATE OF ENTRY AND MAILING OF ORDER

THIS IS TO CERTIFY that the above Order was entered in the Office of the Judge of Compensation Claims and a copy was served by mail or email on each party shown below and their respective attorneys, if represented, this 29 day of May, 2014.



Deputy Clerk to Judge Sturgis

COPIES FURNISHED:

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REYES MENDOZA
OJCC#12-022645KAS

EXHIBIT A

- Exhibit #1: Petition for benefits docketed on 10/24/13 and response thereto.
- Exhibit #2: Mediation Conference Report filed 01/09/2014.
- Exhibit #3: Notice of Pretrial and Final Hearing, and notice of rescheduled Final Hearing.
- Exhibit #4: Uniform Pretrial Stipulation and Order Approving Pretrial Stipulation.
- Exhibit #5: E/C's trial memorandum for purposes of argument only.
- Exhibit #6: Claimant's trial memorandum for purposes of argument only.
- Exhibit #7: Deposition transcript of Dr. Idewu filed by Claimant's counsel.
- Exhibit #8: 120 Day letter filed by E/C.
- Exhibit #9: Notice of Denial filed by E/C.
- Exhibit #10: Deposition transcript of Claimant filed by E/C.
- Exhibit #11: Deposition transcript of Juan Furentes Cruz filed by E/C.
- Exhibit #12: Medical Records of Dr. Gomez & Dr. Hood, Parts 1 through 3, filed by E/C.